United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1168 74 1348

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Association of Independent Television Producers and Distributors, Petitioner, v. Federal Communications Commission and United States of America, Respondents, Westinghouse Broadcasting Company, Inc. et al., Intervenors.	)	Case No. 74-1168
Westinghouse Broadcasting Company, Inc., Petitioner, v. Federal Communications Commission and United States of America, Respondents, Columbia Broadcasting System, Inc. et al., Intervenors.	)	Case No. 74-1283
Warner Bros. Inc. et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents, MCA Inc. et al., Intervenors.	)	Case No. 74-1348

PETITION OF PETITIONERS WARNER BROS. INC. AND COLUMBIA PICTURES INDUSTRIES, INC. AND INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS AND SAMUEL GOLDWYN PRODUCTIONS FOR REHEARING OR, ALTERNATIVELY, SUGGESTION FOR REHEARING EN BANC

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PETITION FOR REHEARING

To The Honorable Judges of the United States Court of Appeals for the Second Circuit

Petitioners Warner Bros. Inc. and Columbia Pictures Industries, Inc. and intervenors Samuel Goldwyn Productions and the National Committee of Independent Television Producers, representing 75 independent television producers, respectfully request, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, rehearing of this Court's decision of June 18, 1974.

En banc rehearing is respectfully suggested because the appeal raises issues of great national importance--namely, government regulation of what millions of Americans may watch on television every night--and because the present decision violates fundamental First Amendment rights. It also denies petitioners a day in court and, in effect, reverses a decision of another panel of this Court on the same issues on the same record. These far-reaching public interest and Constitutional questions ought to be considered by the full Court and resolved with one voice.

STATEMENT

In 1970, the Federal Communications Commission (FCC) promulgated the prime-time access rule (PTAR), prohibiting television stations in the top 50 markets from broadcasting network programs in more than three of the four prime-time hours (7 to 11 PM). In practice, access time generally became 7-8 PM. The rule also

prohibited the use in access time of programs previously telecast on networks or feature films recently televised in a market.

In view of adverse experience under PTAR, the FCC in 1972 commenced rule-making proceedings to repeal or modify the rule. In those proceedings, the FCC found in unchallenged findings that PTAR had led to a serious decrease in the diversity of program choices for viewers.* Game and quiz shows (e.g., "Let's Make A Deal" and "The Price Is Right") increased from 11% to 55% of access time periods; some stations presented these game shows every night; and viewers in some markets had no other choices because all local stations presented game shows at the same time. Because of the five-fold increase in game shows, more diversified types of programs, particularly dramatic and comedy programs, disappeared or declined in access time periods. In addition, PTAR led to a doubling of commercials in the access hour (when children watch most) and also to a decline of network public affairs, documentaries and children's programs.**

In view of these adverse developments, several Commissioners openly advocated total repeal of PTAR. But, by a narrow vote last November, it was decided to continue PTAR for an additional period provided that there were modifications in the rule to ameliorate some of its adverse effects. The amendments, among other things, eliminated access time on Sunday nights and reduced it to one-half hour (7:30-8 PM) on other nights, with special exceptions for children's specials,

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* See FCC Report and Order of February 6, 1974 ("Report"), ¶¶79, 92, App. C, pp. 2-6; FCC's Appeal Brief, pp.14, 17, 18-19, 24-25.

** Report,¶32(4), 83-84, 100-01.

documentaries and public affairs programs.* To reduce further public injury, the FCC decided that the amendments should take effect at the start of the next television season in September 1974. Motions for stays of the new rule until September 1975 were denied twice by the FCC and once by a different panel of this Court (Judges Mansfield, Hays and Davis), which ordered an expedited appeal on March 12.

But now, a different panel (Judges Hays, Oakes and Christensen) has legislated a one-year continuation of the old PTAR without even discussing the FCC's undisputed findings of public injury or petitioners' claim that PTAR (the original or amended version) violates basic First Amendment rights. The panel holds that the FCC "failed to allow adequate time for the amendments to become effective" (4258) because the September 1974 effective date does not give 14 access producers seeking delay "sufficient opportunity to withdraw from these ventures without unnecessary expense" (4264). The Court remanded the case to permit the FCC to specify a new effective date not earlier than September 1975 (4258, 4266). It "postponed consideration of the merits" (4268) and dismissed the petitions without prejudice to renewal after the FCC has conducted "any further proceedings it may deem desirable" (4258). While the Court repeatedly stated that it was not directing the FCC to undertake any further proceedings, it was highly critical of the FCC's action on the merits (4268-73).

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* The other amendments to PTAR are described in the slip opinion (4262).

Since the entire television industry had planned for the new season beginning in September in reliance on the FCC's amended rules and the three stay denials, the present decision has produced chaos in the industry just before the advent of the new season* and is certain to cause injury to the public, producers, broadcasters and advertisers. The decision will lead to even more game shows because they can be produced virtually over-night--a necessity created by the decision's eleventh-hour change in the ground-rules; and it has already led to the cancellation of brand-new regular prime-time series of news documentaries and children's specials on Saturday nights and six half-hours of weekly family entertainment on all three networks due to the loss of one hour early Sunday evenings.**

REASONS FOR GRANTING REHEARING

(1) It Was Improper To Continue PTAR Without Considering Its Constitutionality.

It is improper to continue a program-regulation rule attacked as a violation of free speech under the First Amendment without first determining this threshold Constitutional question. If PTAR is unconstitutional, it should not be continued for a minute, no less a year.

Petitioners claimed that in light of experience PTAR (in its original or modified form) violates the First Amendment because it interferes with the freedom of producers and broadcasters (Miami Herald Publishing Co. v. Tornillo,

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* Variety, June 26, 1974, pp. 1, 35, 54, 76; The New York Times, June 20, 1974, p. 79; The Wall Street Journal, June 20, 1974, p. 17.

** See sources cited in n. *, supra.

42 U.S.L.W 5098 (June 25, 1974); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); New Jersey State Lottery Comm. v. FCC, 491 F.2d 219 (3rd Cir. 1974) pet. for cert., 42 U.S.L.W. 3586 (April 16, 1974) and also with the public's right to the greatest diversity of program choices (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). Petitioners are entitled to a decision on that issue now. FCC v. WJR, 337 U.S. 265, 284 (1949); FTC v. Universal-Rundle Corp., 387 U.S. 244, 249 (1967). The question of the effective date of amendments is not reached until the Constitutional challenge is first resolved.

While this Court upheld PTAR three years ago in Mt. Mansfield on the basis of FCC predictions that it might increase diversity of programs, the present decision recognizes that Mt. Mansfield "did not preclude a further review of experience with the rule if it proved to be inimical to the public interest" (4260). Indeed, such a review is mandatory. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. U.S., 319 U.S. 190, 225 (1943); American Trucking Ass'ns. Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967). In Red Lion, the Supreme Court stated:

> "And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." (395 U.S. at 393).

The present decision fails to meet the Court's duty to "reconsider the constitutional implications". By refusing to consider this threshold Constitutional issue and ordering

continuation of the old PTAR, the decision has done more than just deny petitioners a day in court--it has implicitly upheld the rule's legality without considering the issue. Petitioners are entitled to a decision on the First Amendment now. So is the public.

(2) The Court Acted To "Protect" Private Interests And Did Not Consider The Public Interest.

The Court continued the old rule despite the FCC's unchallenged findings of public injury because it believed that 8 months (really 10 months)* lead-time did not give the 14 access producers seeking delay "sufficient opportunity to withdraw from these ventures without unnecessary expense"(4264). That factual premise, as shown below, is not supported by the record. More important, the FCC's paramount concern is the public interest--the millions of Americans who rely so heavily on television--and not any group of private entrepreneurs. Indeed, in another section of its opinion, the Court itself declared (4271) that the FCC "must place the public interest above private interests." So must the Court. Administrative agency action may--indeed must--dislocate private interests when the public interest requires change, even when this causes a serious and retroactive economic loss to vested interests (which is not the case here). See General Telephone Co. v. United States, 449 F.2d 846, 864 n. 18 (5th Cir. 1971), and cases cited therein.

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* The television industry, as NAITPD concedes, interpreted the FCC's November 1973 Public Notice of the new PTAR as going into effect in September 1974. NAITPD Stay Petition before FCC, February 8, 1974, p. 2.

(3) The Decision's Broadside Criticism of the FCC Requires Repeal of PTAR.

Despite its disclaimers of dealing with the merits, the present decision is so highly critical of the FCC on the merits that reversal was mandated. PTAR's two goals--increasing program diversity and decreasing network dominance--have been frustrated. The FCC concedes a deterioration of diversity. And its Economist found an increase in network dominance--findings confirmed by the networks' switch in position from opposing to supporting PTAR. The present decision strongly criticizes the FCC:

(a) for failing to consider its Economist's Report (4268-70), noting that PTAR was enacted "to combat the stranglehold" of the networks (4260) and that "the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media" (4270);

(b) for failing to consider the impact of PTAR--its decrease of diversity and doubling of commercials--on children, minority groups, consumer groups, and actors and playwrights, noting that the rule "directly affects what millions of Americans watch on television for an hour every night and, indirectly, may affect all prime time programming" (4271-73);*

(c) for failing to consider the adverse impact on the domestic production industry of PTAR's artificial stimulation of foreign programs (from less than 1% to 20% of access time periods), noting that the FCC "displays the same ambiguity about this development as it shows on many other issues" (4270-71); and,

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* Contrary to the decision, the views of many such and similar groups were made known to the FCC.

(d) for reaching a "compromise between the interests of different broadcasting groups" contrary to its duty to "place the public interest above private interests" (4271-72).

The Court's sweeping criticism of the FCC's opinion--coupled with the FCC's admission that its own rule led to a decrease in the range of program choices for viewers--require reversal of the FCC's Report and Order, a total repeal of PTAR, and a remand for the FCC to consider other ways to increase diversity and decrease network dominance. But instead of taking that decisive step, the panel here devised an impermissible "holding action"--it stayed the FCC's Report for a year on private-interest grounds, strongly urged renewed FCC deliberations to "reconsider" its action, and indefinitely postponed the petitions seeking repeal of PTAR. That approach is unprecedented and clearly improper. It allows the continuation of a rule that injures the public and violates the First Amendment; it prevents meaningful review of agency action; and it creates chaos in the television industry.

(4) Assuming PTAR Is Not Repealed, The Court Exceeded the Proper Scope of Judicial Review by Improperly Staying The Effective Date Of Amendments Designed To Ameliorate Some Of Its Adverse Effects.

Limited Scope of Judicial Review As To Effective Dates: Of all the areas of administrative agency action subject to judicial review, courts have the least discretion when reviewing the effective date of an agency rule. The Supreme Court has declared that the timing of such action is uniquely within the area of agency discretion and expertise and may not be upset "in the absence of a patent abuse of discretion." Moog Industries, Inc. v. FTC,

355 U.S. 411, 414 (1958); FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). The Court here found no "patent abuse of discretion" but instead concluded that longer lead-time "would be desirable" (4265). But the Court clearly cannot substitute its own judgment for that of the expert agency on this point. And, in doing so here, it overlooked and did not even discuss the decisive and undisputed FCC findings of public injury.

The issue of an effective date received detailed consideration by the FCC in two opinions. After the release of its November 1973 Public Notice announcing the amendments to PTAR, the FCC considered and rejected NAITPD's petition requesting a one-year stay in its Report and Order of February 6, 1974 (¶¶113-16). It denied that petition on public interest grounds, noting that "the rule is in effect a restraint, whose maintenance to the full extent it now exists we cannot find to be justified" (¶116). Thereafter, NAITPD filed a second stay petition, supported by Time-Life. After considering responses from more than 30 parties, the FCC once again denied the petition in an Opinion dated March 6, 1974 (29 RR 2d 997). The FCC found that the effective date was "designed to give enough 'lead-time' for an orderly transition and yet implement reasonably early the changes found to be in the public interest" (¶3). The Commission also rejected NAITPD's claims of injury as "speculative" (¶4) and, in any event, subordinate to public interest considerations. The present decision, which discusses the rationale of the FCC's

first denial of a stay, apparently overlooked the second opinion.*

The FCC, in selecting an effective date for its amendments, logically chose the start of the next television season--10 months after its November 1973 Public Notice. This was surely a matter of judgment well within the area of the agency's discretion and expertise. Inexplicably, the present decision does not even discuss the FCC's undisputed findings of public injury which required a reasonably prompt change in the rule. Instead, it relies solely on claims of private injury.

Judicial Legislation of Agency Rules: The panel did more than remand to the FCC to select a new effective date. It provided that said date could not be prior to September 1975. This was legislating a minimum time period--a matter which is clearly within the exclusive jurisdiction of the FCC's legislative power in its rule-making role. The agency, not the Court, legislates rules. Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618-19 (1944); F.P.C. v. Idaho Power Co., 344 U.S. 17, 20-21 (1953); National Association of Motor Bus Owners v. F.C.C., 460 F.2d 561, 565-66 (2d Cir. 1972). Assuming arguendo that selection of the September 1974 date was "a patent abuse of discretion", the FCC has the right to consider other possible effective dates (e.g., January 1975, the beginning of the "second season," when networks traditionally make substantial changes in their schedules).

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* The March 6 opinion is reproduced in the record before the Court (Joint Appendix 180-83) and was called to its attention in the briefs on the stay motion and expedited appeal.

De Novo Consideration of Evidence Not Before FCC:

In accepting allegations of injury by NAITPD and Time-Life, the Court relied on the vague and conclusory ex parte affidavits submitted by those parties in support of their motions in this Court in March for a stay pendente lite.* But such affidavits and most of the detailed factual allegations therein were not presented to the FCC in the first instance. Indeed, NAITPD (which represents 13 of the 14 producers seeking stays) told the FCC that "the confidentiality of individual members' business affairs precludes the recitation of specific instances" of alleged injury.** In reviewing agency action, a court cannot make de novo findings based on factual material not presented to, and passed upon, by the agency in the first instance. FTC v. Universal-Rundle Corp., 387 U.S. 244, 250, 252, n. 5 (1967); NBC v. United States, 319 U.S. 190, 227 (1943); Zuber v. Allen, 396 U.S. 168 (1969); United States v. Bianchi & Co., 373 U.S. 709 (1963).

Facts Overlooked By Court:

(a) The decision's assumption that access producers had stockpiled programs in reliance on continuation of PTAR in its old form is refuted by the undisputed findings that 75% of access time is filled by game shows (55%) or foreign programs (20%).*** Game shows--requiring a master of ceremonies, studio audience and

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* This is what Time-Life, for example, cited in its brief on the expedited appeal on the merits, p. 9.

** NAITPD Petition for Clarification before FCC, December 15, 1973, attached as App. C to NAITPD's Petition for Stay in this Court, February 28, 1973.

*** Report, App. C, pp. 2-3.

camera--are made virtually overnight after being ordered by broadcasters; and foreign shows are made primarily for foreign networks and sold here, if at all, generally after recouping costs abroad. Games are the cheapest form of programming.

(b) Producers really had more than 8 months advance notice. Since PTAR was an experimental rule, they knew in 1970 that it was subject to change--a fact cited in the decision itself (4260). They had clearer and unmistakable warning two-years ago when the FCC instituted new rule-making looking to total repeal or substantial modification of PTAR. And the FCC's November 1973 Public Notice of the amendments to PTAR gave them 10 months advance notice prior to the September 1974 season.

(c) The particular facts as to the 14 producers seeking the one-year delay: NAITPD's 13 members, specializing primarily in game shows made virtually overnight, told the FCC last winter that the November Public Notice put a "virtual halt [to] creation [and] development" of access shows.* Time-Life--which made only <u>one</u> regular access program and then only <u>after</u> the commencement of the new rule-making proceeding--wrote the FCC last fall that it "has delayed. . .production commitments . . .because it cannot proceed until it knows what changes, if any, the Commission is going to adopt."**

(d) While the decision states that the FCC "allowed

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* NAITPD Petition for Clarification to FCC, December 15, 1973, p. 1, annexed as App. C to NAITPD Petition for Stay in this Court, February 28, 1974.

** Ex. A to affidavit of Wynn Nathan, March 5, 1974, in support of Time-Life stay motion in this Court.

a much longer grace period" when it adopted the original rule (4265), the difference--16 rather than 10 months--is certainly a matter within the discretion of the agency, particularly when amending an existing rule with long advance warning rather than promulgating a new rule.*

(e) The statement that the effective date "gives the networks inadequate time to plan additional programming" (4267) is refuted by contrary statements by the networks in opposing NAITPD's stay motions. After all, the revised rule only allows the networks to increase their schedules by 1 or 1-1/2 hours per week; and they all made commitments to do so prior to the recent decision.

(f) Finally, the decision states that "virtually all the relevant testimony recommended a longer grace period than the Commission allowed" (4266). That is not correct. As opposed to the 14 producers seeking a one-year stay, almost 100 producers urged changes for the September 1974 season.

If the decisive issue were private rather than public interests, the decision does far more violence to the large number of producers who invested in new programs in reliance on the amended rule announced in November 1973 and the three denials of stays. And if the issue were the adequacy of 10-months lead time, the decision surely produces chaos by changing

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* In 1970, when enacting the original rule, the FCC allowed start-up time for what it hoped would be a new industry producing diverse programs. But that did not happen. Four years later, in amending the rule, the FCC knew that it was dealing primarily with game and foreign shows from a handful of established producers.

the rule just three months before the new season. But the issue is not private interests. It is the public interest and the First Amendment rights of creators, broadcasters and viewers. Those fundamental issues are ignored in the current decision.

(5) The Decision Reverses The Denial of Stay By A Different Panel By Applying Erroneous Legal Standards.

Staying administrative agency rule-making action without deciding the merits--in effect a stay pendente lite--is a drastic step requiring a convincing showing that (1) the public interest compels a stay; (2) the party seeking the stay has a reasonable likelihood of prevailing on the merits; (3) he will suffer irreparable harm; and (4) competitors will be unaffected by a stay. Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); Yakus v. United States, 321 U.S. 414 (1944); Eastern Airlines, Inc. v. Civil Aeronautics Board, 261 F.2d 830 (2d Cir. 1958). Here, the Court based its decision solely on claims of injury by access producers. And what it did is far more drastic than a stay pendente lite. It ordered a one-year continuation of the challenged rule and indefinitely postponed a decision on the merits--and it did so on the virtual eve of a new television season, after a different panel had denied a stay on the same record four months ago.

As Justice Frankfurter, speaking for the Court, held in Scripps-Howard, a stay by an appellate court may not "operate as an affirmative authorization of that which the [Federal

Communications] Commission has refused to authorize." 316 U.S. at 14. Yet this is precisely the effect of the decision of this Court when it failed to consider the applicable standards for a stay and--contrary to the express findings of the FCC--virtually relegislated a new effective date for the modified rule as well as a 12-month continuation of the original rule.

CONCLUSION

This petition for rehearing, or rehearing en banc, should be granted and on rehearing the validity of the prime-time access rule should be determined.

Respectfully submitted,

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Dated: July 2, 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Association of Independent Television Producers and Distributors, Petitioner, v. Federal Communications Commission and United States of America, Respondents, Westinghouse Broadcasting Company, Inc., et al., Intervenors.	)	Case No. 74-1168
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Warner Bros. Inc. et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents, MCA Inc. et al., Intervenors.	)	Case No. 74-1348 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DONALD E. BROWN, being sworn, says:

On the 2nd day of July, 1974, I served a Petition for

Rehearing or, alternatively, Suggestion for a Rehearing En Banc ("Petition") upon the following attorneys in this action, and in the closely-related actions, National Association of Independent Television Producers and Distributors v. Federal Communications Commission and United States of America (Dkt. No. 74-1168) and Westinghouse Broadcasting Co., Inc. v. Federal Communications Commission and United States of America (Dkt. No. 74-1283) at the following addresses so designated by them for that purpose:

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Said service was made by depositing two copies of the attached Petition enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

I am not a party to the action, am over 18 years of age and reside at 301 East 69th Street, New York, New York.

Donald E. Brown

Sworn to before me this
2nd day of July, 1974.

Notary Public

CAMERON CLARK
Notary Public, State of New York
No. 31-5704575
Qualified in New York County
Commission Expires March 30, 1976